

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



75-7002

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UNITED STATES COURT OF APPEALS  
For The Second Circuit

B

ULMONT O. CUMMING, JR.,

Plaintiff-Appellant.

--against--

SELMA ELLISON a/k/a SELMA HERSHFELD,

Defendant-Appellee.

P/S

On Appeal from The District Court of the United States  
for the Southern District of New York

APPELLEE'S BRIEF UPON APPEAL

NEWMAN, ARONSON & NEUMANN  
Attorneys for Defendant-Appellee  
Office & P.O. Address  
350 Fifth Avenue  
New York, New York 10001



NEWMAN, ARONSON & NEUMANN  
EMPIRE STATE BUILDING  
350 FIFTH AVENUE, NEW YORK, N.Y. 10001

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
: ULMONT O. CUMMING, JR.,  
: Plaintiff-Appellant,  
: --against--  
: SELMA ELLISON a/k/a SELMA HERSHFELD,  
: Defendant-Appellee.  
: -----X

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF UPON APPEAL

Issues Presented For Review

1. That the complaint does not assert a cause of action for the recovery of the subject apartment or for the court's protection of the plaintiff-appellant's use and occupation thereof?

2. Upon the papers submitted to the court, that the plaintiff-appellant is not entitled to summary judgment because of the existence of a factual issue

as to plaintiff-appellant's claim of retaliation or defendant-appellee's claim that the plaintiff-appellant was a bothersome and disagreeable tenant which justified his removal.

Statement of the Case

Appellant Cumming appeals from a decision of the United States District Court for the Southern District of New York, re-printed at page 52 in the appendix, denying appellant's application for summary judgment.

This is an action by ULMONT O. CUMMING, JR., ("Cumming") against SELMA ELLISON a/k/a SELMA HERSHFELD ("Ellison") for declaratory judgment, a writ of injunction and compensatory damages pursuant to Section 210(a) of the Economic Stabilization Act of 1970, as amended, to protect and redress certain legal wrongs suffered by Cumming due to certain acts and practices of Ellison arising out of said Act or any order or regulation issued pursuant thereto. Cumming also seeks punitive damages.

Previously, and as contained in the lower court's memorandum filed May 2nd, 1974, in which it denied Cumming's motion for a preliminary injunction, and the court's memorandum filed June 27th, 1974,



denying Cumming's motion for partial summary judgment on the issue of liability alone, the court denied Ellison's cross-motion for judgment dismissing the complaint, expressly holding that:

(1) Section 210 of the Economic Stabilization Act of 1970, as amended, authorizes the present suit;

(2) The complaint states a cause of action upon which relief may be granted;

(3) The cause of action is not barred by the principles of election of remedies, collateral estoppel, or res judicata.

A copy of the court's memorandum filed May 2nd, 1974 is re-printed at the end of Appellant's Brief Exhibit "A" and a copy of the court's memorandum filed June 27th, 1974 is re-printed at the end of Appellant's Brief marked Exhibit "B".

The parties hereto are also bound by a determination of the Supreme Court of the State of New York, Appellate Term, First Judicial Department, to the effect that Ellison was mandated by the Economic Stabilization Act of 1970, as amended (6 C.F.R. 301.208(b) 1 and 2) to offer a renewal lease to Cumming and Ellison did not make such a tender. The Appellate Term went on to hold that absent this tender, the tenant was not wrongfully holding over and a summary proceeding commenced in the City of

New York, County of New York, upon which Ellison recovered possession of the subject premises from Cumming, should not have been maintained because the landlord could not show a clear right to possession. A copy of this decision of the Appellate Term of the Supreme Court of the State of New York, First Department, is reprinted at the end of this brief as Appellant's Exhibit "C".

#### The Statement of Facts

The statement of facts set forth in Appellant's Brief (page P4) is substantially correct and refers to the statement of facts set forth in the Appellee's brief with the exception of any opinions or conclusions which may be contained therein.

#### Summary of the Argument

Ellison contends that there is a question of fact that should be left to the trier of the facts. Cumming contends that there was a retaliatory eviction and Ellison contends that Cumming's conduct and his relationship with her was so bad that it affected her health and that the Appellant Cumming was in fact a bothersome and otherwise disagreeable tenant, loud and boisterous who threatened Ellison and slammed doors. Both sides have presented facts which might equally tend



to support or negate the existence of an intent to  
retaliate.



POINT I

THE LOWER COURT WAS CORRECT IN HOLDING  
THAT THE COMPLAINT FAILED TO STATE A  
CAUSE OF ACTION FOR THE RECOVERY OF THE  
SUBJECT APARTMENT.

Leave is most respectfully requested to refer to the memorandum decision of Judge Tenney, dated December 12, 1974. The reasoning of Judge Tenney in his decision wherein he denied Appellant's motion is clear, cogent and compelling and fully sustained his honor's denial of the plaintiff-appellant's motion for summary judgment on the issue of Appellant's right of possession of the apartment involved.

POINT II

THE QUESTION OF PLAINTIFF-APPELLANT'S  
ASSERTION OF RETALIATORY EVICTION AND  
APPELLEE'S CONTENTION THAT CUMMING'S  
CONDUCT JUSTIFIED THE EVICTION, IS PERTINENT  
TO THE ISSUES HEREIN AND PRESENTS A QUESTION  
OF FACT WHICH SHOULD BE LEFT TO THE TRIAL  
COURT.

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Plaintiff-Appellant has asserted a claim of retaliatory eviction. Defendant-Appellee has set forth in her answering affidavits to the various motions for summary judgment heretofore made herein that there was a history of clashes between herself and Cumming. Ellison suffers from severe arthritis, has had a double mastectomy and was confined for three weeks during January of 1975 at Lenox Hill Hospital where the diagnosis was cancer of the spine.

Cumming's conduct fully justified the eviction proceedings.



CONCLUSION

The decision of the District Court is correct in every respect.

The decision below should be affirmed in favor of the Defendant-Appellee, with costs.

Dated: New York, New York

February 24, 1975

Respectfully submitted,

NEWMAN, ARONSON & NEUMANN  
Attorneys for Defendant-Appellee  
Office & P.O. Address  
350 Fifth Avenue  
New York, New York 10001  
Telephone: (212) 695-5575

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK)

MURRAY SPELMAN, being duly sworn, deposes and says:  
That she is in the employ of NEWMAN, ARONSON & NEUMANN, ESQS.,  
attorneys for the within named DEFENDANT- APPELLEE herein,  
and is over the age of 21 years. That on the 25<sup>th</sup> day of  
FEBRUARY, 1975, she served the within APPELLEE'S  
BRIEF upon the attorneys for the respective  
parties named below, by depositing a true copy of the same to  
each of them, securely enclosed in post-paid wrappers in a  
post office box regularly maintained by the United States  
Government at 350 Fifth Avenue, in said County of New York,  
directed to each of them at their respective addresses set  
forth below, those being the addresses within the State  
designated by them for that purpose on the preceding papers  
in this action, or the places where they then kept their  
respective offices between which places there then was and now  
is a regular communication by mail:

ULMONT O. CUMMING, JR.  
PLAINTIFF- APPELLANT, PRO- SE  
90 NYLOR, LIMITED  
14 EAST 60<sup>TH</sup> STREET, SUITE 502  
NEW YORK N.Y. 10022

Sworn to before me this

25 day of February

, 1975.

NOTARY PUBLIC, STATE OF NEW YORK  
No. 44-4401725  
Qualified in Rockland County  
Certificate filed in New York County  
Commission Expires March 30, 1975